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DEC 31

CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935

**No. 544**

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and T. S. HEDGES and T. M. JENNER, as members of the Tax Commission of the State of Washington, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

## BRIEF OF APPELLANT

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## BRIEF OF APPELLANT

### STATEMENT

This is an appeal from the decision of the Supreme Court of the State of Washington, rendered August 13, 1935, holding valid as to the appellant a statute of that state (Chapter 191 of the Laws of 1933), which statute sought to impose upon the appellant a tax of three per cent of its gross intrastate revenues ostensibly for the privilege of doing an intrastate telephone and telegraph business (83 Wash. Dec. 52; 48 Pac. (2d) 938; R. 151).

The provisions of the act, so far as here material, are as follows:

"Section 2(2). From and after the first day of August, 1933, and until the thirty-first day of

July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: * * *

"Section 2(2)(e). Upon every person engaging or continuing within this state in the following businesses; as to such persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

"VI. Telephone and telegraph companies: three per cent;"

Incidentally it may be said that three per cent is the highest rate imposed by the act upon any business.

"Section 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function."

Other provisions of the act relate to the making of returns to the State Tax Commission of Washing-

ton, penalties for failure to make such return or to pay the tax, the collection of the tax by levy upon and sale of real and personal property by summary proceedings, and the subjection of the non-complying taxpayer to imprisonment.

Shortly after the act became effective a number of railroad companies instituted suits to test the validity of the act as applied to such companies, the act imposing upon railroad companies a tax of one and one-half per cent of their gross intrastate revenues.

As the questions involved in those cases were, with one exception, identical with the questions which would be involved if this appellant instituted suit, no action was taken by this appellant until November, 1933, at which time it, together with The Home Telephone and Telegraph Company of Spokane (hereinafter called the Home Company), then a subsidiary of The Pacific Telephone and Telegraph Company, brought, as they had a right to do under the laws of the State of Washington, separate suits to enjoin the enforcement of the act.

No returns were filed by this appellant until June, 1934. On May 29, 1934, the Tax Commission addressed a letter to the counsel for both this appellant and the Home Company, in which it was stated that, unless returns were made by such companies for the months of August, 1933, to March, 1934, the Commission would proceed to assess the tax against such companies, and the companies failing to pay the same, their real and personal property would be sold by the sheriffs of the various counties of the State of Washington, in accordance with the provisions of the act.

Thereupon both the appellant and the Home Company filed returns, under protest (Exhibit 22, R. 129).

On July 12, 1934, temporary injunctions against the enforcement of the act were granted by the trial court (R. 14). The Tax Commission appealed from the decrees granting such temporary injunctions to the Supreme Court of the State of Washington. The decrees were affirmed (180 Wash. 673, 698). In the opinion in the case of appellant it is said:

> "As appears from the complaint, the respondent owns and operates a telephone and telegraph system in the states of Washington, Oregon, California and Idaho, furnishing to the public telephone exchange service, both interstate and intrastate. It is alleged that the interstate and intrastate business are inseparable, commingled and mutually dependent, and that both classes of business are done over the same telephone and telegraph lines through the same exchanges, operated by the same employees and with the same facilities.
>
> * * * * * *
>
> "In the case now before us, as appears from the allegations in the complaint, there are grave and difficult questions of law and fact to be ultimately determined, one of which is whether the respondent can, either as a matter of fact or law, withdraw from its intrastate business without also withdrawing from its interstate business; and this presents a Federal question which can only be determined with finality when the United

States Supreme Court speaks thereon." (180 Wash. 673, 676)

The two cases were tried together, resulting in decrees permanently enjoining the enforcement of the act. Appeals were promptly taken by the Tax Commission to the State Supreme Court, which reversed the trial court, two judges dissenting (83 Wash. Dec. 67; 48 Pac. (2d) 938; R. 151).

A few days after the rendition of the first opinion a supplemental opinion was filed, directing the trial court to dismiss the action brought by this appellant (83 Wash. Dec. 308; 48 Pac. (2d) 938; R. 165).

By stipulation, the case of the Home Company abides the result of this appeal, and there has been eliminated from the record in this case, so far as possible, the exhibits and testimony relating to the Home Company.

An extended statement of the undisputed evidence adduced at the trial would serve no useful purpose, as in the opinion of the court below it was said that the appellant could not "as a matter of law retire from its intrastate business [and] that it [was] impracticable, as a matter of fact, to so retire without also retiring from its interstate business." 83 Wash. Dec. 62. True, this particular statement was made in the opinion in the *Northern Pacific Railway Company* case (Case No. 529 in this court). The *Northern Pacific* case and the *Great Northern Railway Company* case, also on appeal to this court, and the cases of this appellant and the Home Company were all argued on the same day in the State Supreme Court. The only opinion of any length written

relative to the four cases was the opinion in the *Northern Pacific Railway Company* case. In the case at bar the court contented itself with saying that "the facts are sufficiently stated in the opinion upon the former appeal and need not be here repeated." The facts stated in the opinion upon the former appeal have been herein quoted on page 4 of this brief. Continuing, the court said:

> "The principal and *controlling* questions are discussed and disposed of in the recent case of *State v. Northern Pacific Railway Co., ante* p. 52, and upon the authority of that case the judgment of the Superior Court will be reversed, with directions to proceed in accordance with the law as found in the case referred to."

In view of this declaration of the court below, only a very brief summary of the evidence is here made.

The appellant is a California corporation, furnishing to the public in the states of California, Oregon, Washington and a portion of Idaho interstate and intrastate telephone and telegraph service. In the year 1932, 673,000 interstate telephone messages originated in Washington (R. 97).

As shown by the books of the appellant, the cost of its plant and equipment at the end of the year 1933, plus the average working assets employed by the appellant during that year, was $57,675,835 (Exhibit 1, R. 102). The company's property had been valued by the Department of Public Works of the State of Washington, the regulatory body of that state, as of June 30, 1922. That body found that the value of the company's property in the State of Washington

at that time was $28,216,654 (Exhibit 4, R. 103). In the opinion of the Department at that time the *value* of the property of a public utility company was *identical with the cost* of its plant and equipment plus the average working assets. P.U.R. 1923D, 118. If there is added to this base figure the net additions to plant and equipment made during each of the years since June 30, 1922, plus the average working assets for the year 1933, it will be found that the cost of the property, as determined by the Department of Public Works, at the end of the year 1933 is $56,976,743 (Exhibit 5, R. 103).

The gross operating revenues for the State of Washington in the year 1933 were $10,154,294.21, of which $9,230,873.58 were intrastate revenues and $923,420.63 were interstate revenues. The total operating expenses other than taxes, intrastate, were $7,909,241.85, and interstate $640,692.04. The taxes actually paid by the company in the year 1933 in Washington were $1,604,796.14 (Exhibit 12, R. 106).

It will readily be seen, however, that the gross interstate revenue for the year 1933 was $672,371.40 *less* than the taxes actually paid by the appellant and attributable to Washington operations in the year 1933 (1,604,796.14 — 932,424.74 = 672,371.40).

The evidence in the case, however, conclusively shows that if the appellant furnished no intrastate service at all, it nevertheless would be compelled in order to render interstate service only to retain in service more than ninety per cent of the plant and equipment then employed by the appellant in render-

ing both interstate and intrastate service (Exhibit 17, R. 111).

The telephone plant and equipment of appellant in Washington was "designed to handle both classes of service [intrastate and interstate] simultaneously or at different times over the same facilities operated by the same employees through the same exchanges" (R. 51). "The same outside facilities, the same exchanges, and the same central office equipment installed in the exchange buildings are used in the transmission of messages, whether intrastate or interstate, and are operated by the same employees, using the same facilities, whether it is interstate or intrastate. The intrastate business cannot be separated from the interstate business" (R. 39). For instance, by the use of the carrier equipment there may be transmitted simultaneously over one pair of wires three telephone conversations and twelve telegraph messages, or two telephone conversations and twenty-four telegraph messages, or one telephone conversation and thirty-six telegraph messages. In the case where three of the channels are used at that particular time for telephone conversation and the remaining channel for telegraph messages the three telephone conversations may be wholly intrastate or wholly interstate, or one of them intrastate and the other two interstate. The twelve telegraph messages may also be wholly intrastate, wholly interstate, or some intrastate and the remainder interstate (R. 37).

It follows, of course, that the various parts of appellant's telephone plant and equipment in Wash-

ington are "inseparable, commingled and mutually dependent" (R. 39).

It is difficult, of course, in view of these facts, to make a correct segregation of the property, revenues and expenses of a large telephone and telegraph company. The *only* way in which this segregation can be made is on a *time use* basis, which method has been approved by this court. *Lindheimer v. Illinois Tel. Co.*, 292 U. S. 151, 155. Using that method, a segregation of the property was made in this case, which resulted in finding that, as hereinbefore stated, over ninety per cent of the property would have to be retained if interstate service only was furnished.

Now it is obvious that if, in order to render interstate service only, ninety per cent of the plant and equipment would have to be retained, that property would be subject to a tax burden one and one-half times as great as the total gross amount received by the appellant in the rendition of its interstate telephone and telegraph service. Not only so, but the property would have to be maintained, and, even if maintained, would depreciate. In addition, the appellant would have to employ and pay operators, superintendents, accountants, agents and officers, and purchase power to operate the plant.

The result is graphically stated in the testimony of Mr. Mastick, at one time chief engineer for the appellant in Washington and Oregon and now general staff engineer for the appellant in the State of Washington and that portion of Idaho in which it operates. He said:

"In the first place, if we abandoned the intra-

state business for solely interstate business, we would have to retain nearly 90% of the property to do it. The revenues received from the interstate business, $1,123,536.49 [for the year 1932] is approximately one-tenth of the total gross revenues received from the combined intrastate and interstate business. Now, it is obvious, even from the standpoint of taxes alone, that if we had to retain 90% of the property to do interstate business, the taxes alone would wipe out the gross interstate revenue, to say nothing of the maintenance to be paid for on the 90% of the plant retained, the depreciation on the property and other expenses that goes with the operation of the property. As I see it, to do solely interstate business and retain 90% of the property, we would go broke." (R. 49).

In answer to the question as to whether the appellant could "efficiently and economically conduct an interstate business over one system and an intrastate business over another system," he said:

"Your Honor, I have been in this business twenty-eight years and as chief engineer of this company in this area of the states of Washington, Idaho and Oregon, I designed and prepared estimates for more than $40,000,000 gross plant additions in those three states and know you could not economically or practically separate the property to carry on interstate and intrastate business. I do not know of any place in the world where a purely interstate telephone plant is built

and purely interstate business is conducted." (R. 49).

Now, Mr. Mastick was the only witness called by either side on this branch of the case. His testimony was wholly unchallenged, and cannot be challenged.

Moreover, as a matter of law, the appellant cannot withdraw from its intrastate business without also abandoning its interstate business. Long prior to the passage of the law here under attack, the court of last resort of the State of Washington had held that a common carrier engaged in both intrastate and interstate business could not renounce local business while continuing its interstate business. *State v. Northern Express Co.*, 76 Wash. 636; *Great Northern Ry. Co. v. State*, 147 Wash. 630. Telephone companies are, along with railroad companies, by Article XII, Section 19, of the Washington State Constitution, and by the Public Service Commission Act, Chapter 117, Laws of 1911, as amended, declared to be common carriers. The court below still adheres to that ruling. It did not decide this case upon the theory that the appellant could, either as a matter of fact or as a matter of law, retire from its intrastate business. It said:

> "In this connection it will be assumed (a) that the respondent cannot, as a matter of *law*, retire from its intrastate business, (b) that it is impracticable, as a matter of *fact*, to so retire without also retiring from its interstate business, * * *." (R. 155)

The case presented here, then, is a case in which it appears, beyond all possible dispute, that the appel-

lant cannot withdraw from its intrastate business without discontinuing its interstate business.

## SPECIFICATION OF ERRORS

1. It being an admitted fact that appellant is engaged in both intrastate and interstate commerce, and the Supreme Court of the State of Washington having held that the appellant "cannot, as a matter of law, retire from its intrastate business," while continuing its interstate business, that court erred in holding that Chapter 191 of the Laws of Washington of 1933, in so far as it seeks to impose a privilege tax upon an interstate carrier on account of local business, does not violate the commerce clause, *viz.*, Article I, Section 8, of the Constitution of the United States.

2. The Supreme Court of the State of Washington, having found that appellant's interstate and intrastate business in Washington is inextricably commingled, and that, as a matter of fact and as a practical matter, appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business, erred in holding that Chapter 191, Laws of Washington of 1933, does not violate the commerce clause, *viz.*, Article I, Section 8, of the Constitution of the United States.

## SUMMARY OF ARGUMENT

Chapter 191, Laws of 1933 of the State of Washington, violates Article I, Section 8, of the Federal Constitution, for the reason that appellant cannot withdraw from its intrastate business without also withdrawing from its interstate business.

It follows that the tax sought to be imposed by the act, while ostensibly levied for the privilege of doing an intrastate business only, is in effect a tax for the privilege of doing both kinds of business.

## ARGUMENT

In the brief of the Northern Pacific Railway Company in *Northern Pacific Railway Co. v. State of Washington*, No. 529, is a historical review of many cases decided by this court dealing with the taxation by a state or its subordinate agencies of companies engaged in both intrastate and interstate business, and, in particular, of companies which, like the appellant, cannot abandon their local business while continuing their interstate business. That review being satisfactory, it would but unduly add to the labor of this court to traverse again the same ground.

The following cases are, therefore, only cited.

*Pullman Co. v. Adams*, 189 U. S. 420;

*Crutcher v. Kentucky*, 141 U. S. 47;

*Allen v. Pullman Co.*, 191 U. S. 171;

*Western Union Tel. Co. v. Kansas*, 216 U. S. 1;

*Barrett v. New York*, 232 U. S. 14;

*Bowman v. Continental Oil Co.*, 256 U. S. 642;

*R. R. Commission v. C. B. & Q. R. Co.*, 257 U. S. 563;

*Colorado v. United States*, 271 U. S. 153.

Discussion will be confined to four cases, all of which were decided by this court in the last eight years.

In *Interstate Busses v. Holyoke Street Ry. Co.*, 273 U. S. 45, it was contended that a statute of Massachusetts was invalid as applied to a bus company which operated a line of busses from a point in Connecticut to a point or points in Massachusetts, but which also carried passengers whose journeys began and ended in Massachusetts. The statute provided for the obtaining of a license from appropriate public officers, and also contained a provision that no motor vehicles should be operated under said license unless the owner thereof should obtain from the Massachusetts Department of Public Utilities a certificate that public convenience and necessity required such operation. "Neither license nor certificate [was] required in respect to such carriage as [might] be exclusively interstate."

Answering the contention of appellant in that case, that the act contravened the commerce clause, this court said:

> "The burden is upon appellant to show that enforcement of the act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying in-

trastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, traveling in interstate commerce on appellant's busses over the part of the route competing with the street railway. It is *not* shown that the two classes of business are so commingled that the separation of one from the other is not *reasonably practicable* or that appellant's interstate passengers may not be carried *efficiently* and *economically* in busses used *exclusively* for that purpose, *or* that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the *unnecessary* transportation of both classes by means of the same instrumentalities and employes."

Now, in the case at bar it will not be even contended by the State that the appellant's intrastate business is "merely linked" to its interstate business, or that the transmission by the appellant of both classes of messages by means of the same instrumentalities and employes is *unnecessary*. On the contrary, "it is shown," by evidence undisputed and indisputable, (a) that "the two classes of business are so commingled

that the separation of one from the other is not reasonably practicable," (b) that appellant's "interstate [messages] may not be carried efficiently and economically [over lines and by instrumentalities] used exclusively for that purpose," and (c) that appellant's "interstate business is dependent" upon its local business to the extent that without such local business no interstate business could be done at all, for the reason that, local business being absent, the charges for interstate messages would be prohibitive of interstate business. True, in the case just referred to, the state statute was upheld by this court, but the clear inference from and the plain import of the language in the opinion is that if the evidence in that case had been like the evidence in this case, the statute would have been condemned.

If the statement just made correctly states the view of this court, then it would seem clear that the court below was in error in denying the relief sought by this appellant. Compliance with the provisions of the Massachusetts statute was made a condition to the right of a carrier to do an intrastate business. In effect, this court held that the *right to do business* could not be so conditioned in the case of one who was engaged in both intrastate and interstate business, if the two classes of business were so commingled that the separation of one from the other was not reasonably practicable. In the case at bar the Washington statute, like the Massachusetts statute, on its face purports to condition only the right to do an intrastate business, but in effect it conditions the right to do *both* classes of business, because "the

intrastate business cannot be separated from the interstate business."

In *Sprout v. South Bend*, 277 U. S. 163, it appears that Sprout was engaged in both interstate and intrastate commerce. The city of South Bend, Indiana, by ordinance forbade the operation of motor busses in the city streets unless licensed by the city. The issuance of a license was conditioned upon the payment of a fee based upon the seating capacity of the bus. This court held the ordinance void, saying:

> "A state may by appropriate legislation require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person *taxed could discontinue the intrastate business without withdrawing also from the interstate business.*"

In *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470, this court again states the rule as follows:

> "While a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business, without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate

business would not be subject to the imposition, *and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business.*"

In *Cooney v. Mountain States Telephone Co.*, 55 Sup. Ct. Rep. 477, this court dealt with a Montana statute imposing a tax of $2.00 on each telephone instrument controlled and operated in the conduct of the business. At the trial of the case the evidence was that "the same telephones, the same signaling apparatus, the same wires, land, buildings, central office equipment, and operating organization are used in common for all services, interstate as well as intrastate" and that plaintiff in that case "could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business" (55 Sup. Ct. Rep. 481, 480). The three-judge court made findings in accordance with this evidence and, despite the challenge of these findings by the Montana state officials, this court approved these findings.

In view of this evidence the statutory court of three judges held the statute invalid. After referring to the principles laid down in the *Sprout* case (277 U.S. 163), and observing that the first three tests or requirements necessary to the validity of the tax under the *Sprout* case had been satisfied, the three-judge court pointed out that the fourth and last requirement was not satisfied. In so holding it said:

"Nevertheless it fails in respect to the fourth of them. For in this day and age it is clear

separate statewide systems for intrastate and interstate phones are not feasible, hardly possible, and to deny the proprietor of the latter the right to also operate the former would so heavily handicap and burden him, it would virtually destroy his business, burden and destroy interstate communication or commerce. Even as in the *Adams* and *Continental* cases, herein separation is impracticable, combination is necessary; and citing those cases to his conditions, by his fourth thereof, Mr. Justice Brandeis evidently means that withdrawal to escape the tax must be practicable and combination not necessary, or the tax is invalid." (7 Fed. Supp. 12, 13)

This court did not deem it necessary to decide that case on that precise ground, a somewhat narrower ground being deemed sufficient to dispose of the case. But surely such a disposition of that controversy without more is no indication whatsoever that this court intended to depart in the slightest from the doctrine enunciated in the *Sprout* and *East Ohio Gas Company* cases. Not only does the opinion in the *Cooney* case contain no hint of such departure, on the contrary it would seem that it negatives any such view, because it reiterates without variation the rule applicable, not to all companies engaged in intrastate and interstate business, but only to those companies so engaged which cannot "discontinue their intrastate business without also withdrawing from their interstate business."

The Supreme Court of the State of Washington, in its opinion in the *Northern Pacific* case discussed the three cases last cited. It made no mention even

of the *Holyoke* case, though that decision was pressed upon its attention. Despite the positive statement of this court that, though a state may require payment of an occupation tax from one engaged in both intrastate and interstate business, yet, in order that the fee or tax shall be valid, it must appear that the person taxed may discontinue the intrastate business without withdrawing also from the interstate business, the Washington Supreme Court held the statute valid as to this appellant, on the ground that the tax sought to be imposed was measured by gross intrastate revenue and was not a flat or graduated license fee or a tax measured by the number of instrumentalities employed in carrying on the business. But what warrant is there for such distinction in the decisions of this court? This court, in the *Sprout* case, said that an occupation tax sought to be levied upon one engaged in both intrastate and interstate business must, in order to be valid, satisfy four distinct requirements, and that *each* and *all* of these requirements must be satisfied. Satisfying some of them, you said, would not be sufficient; they must *all be satisfied.*

Now, one of these requirements is that the tax must be imposed solely on account of the intrastate business. The Washington act under attack does measure the tax by gross receipts from intrastate business only. The act, therefore, does satisfy the first requirement, also the second and third. But it *does not satisfy* the fourth requirement, namely, that the person taxed can discontinue intrastate business without withdrawing also from interstate business.

There is not even a hint in the *Sprout* case that if the tax imposed upon intrastate business solely is measured by gross intrastate receipts, then the fourth requirement is not essential to the validity of the act. If ability to withdraw from intrastate business without withdrawing also from interstate business is absolutely essential to the validity of an occupation tax sought to be levied upon one engaged in both classes of business, what possible difference can it make how the tax sought to be collected is measured or determined? Inability to withdraw from one class of business without also withdrawing from the other class of business depends either upon the law or upon the facts, or, as here, upon both the law and facts. The amount of the fee or tax and the method by which it is determined or measured has nothing to do with the question of inability.

Emphasis for these views, if any is needed, is found in the *East Ohio Gas Company* case. The Ohio act, like the Washington act, imposed a tax of a prescribed percentage on gross *intrastate* receipts from the sale of natural gas. It was imposed for the privilege of carrying on intrastate business. This court's reiteration of the rule announced in the *Sprout* case related, therefore, to a tax on gross intrastate receipts only. Now, if the view of the court below is correct, there was no need of reiterating in the *Ohio Gas Company* case the rule announced in the *Sprout* case; and this court is convicted of doing not only a useless thing but also of introducing confusion into the law. This must be true, because if, as the court below decided, the doctrine of inability to withdraw

has no application to a tax on gross intrastate receipts, but relates only to a flat or graduated license fee or a tax measured by the number of instrumentalities, then there was no need to mention that doctrine in the *Ohio* case at all. True, the Ohio tax statute was upheld, but solely upon the theory that "the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of *purely local concern* exclusively within the jurisdiction of the State." The *Ohio Gas Company* case, in view of this announcement, did no interstate business and derived no revenue from such business. All its business was intrastate business. And the tax sought to be collected was a tax on the *only* business in which the company was engaged.

The court below attached great significance to the following language in the opinion in the *Cooney* case:

> "But the tax is not laid on revenues. It is not laid on revenue derived from monthly rates as distinguished from toll charges. It is not imposed with respect either to the nature of the revenue, or to the character of the service from which the revenue is derived, or to the manner in which the charges for the service are fixed."

In view of this language, they deduced the curious conclusion that "if the tax were of the character described in the quotation just made from the opinion, the result might be different."

But the statement just quoted from the *Cooney* opinion constituted a reply to an argument presented by the State of Montana. It had insisted that the Montana legislature intended to levy a license tax only upon the domestic or intrastate business of the Mountain States Telephone Company and that such intention was shown by the fact that the statute imposed the tax only upon certain telephone instruments, and that the ones to be taxed were determined by certain specific flat monthly rates charged. In substance, the state argued that as a flat charge was made for local service, while toll charges varied as to the length of time and haul, and that as the tax was laid only upon residence telephones where the rate was $2.00 a month and business telephones where the rate was $3.00 a month, that fact showed that it was not the intention of the Montana legislature to tax the interstate business of the Mountain States Company. It was in reply, as we have said, to that argument that this court made the statement it did. "The question is," as this court said, "not as to the instruments that are not taxed, but as to those which are taxed." The instruments taxed were used for both intra and interstate purposes, and that fact having been shown by the evidence, this court held the Montana statute invalid.

In the court below the appellees sought to make some point out of another statement made in the decision in the *Cooney* case. That statement is that

> "There are 'sufficient modes' in which the local business may be taxed without the impo-

sition of a tax 'which covers the entire operations'."

In view of the fact that the appellant in 1933 paid the State of Washington and its various subordinate agencies over 15½% of its total gross intrastate and interstate revenues, it would seem that "sufficient modes" of taxing the appellant had been employed. Among the modes employed is the imposition of an annual license fee 'for the *privilege* of doing an *intrastate* business" (Chapter 227, Laws of 1927, Section 5), and the imposition of another license or regulatory fee of one-tenth of one per cent of its gross operating revenues, as provided by Chapter 107, Laws of 1929.

One further statement of the Washington Supreme Court may be briefly considered. For some inscrutable reason, that court mentioned the fact that the *people* of the state, employing the power of the *initiative*, enacted what is commonly called the 40-mill tax limit act, saying:

> "It is a matter of common knowledge that, under the 40-mill tax limit law, property is now paying about half of what it paid for general taxes prior to the passage of that law; in other words, that, by reason of the law limiting the amount to forty mills, the tax burden upon both real and personal property of the state has been reduced approximately one-half. Having thus provided for a reduction of taxes upon real and personal property, it was necessary for the legislature to find other sources of revenue, and

chapter 191 was undoubtedly passed for this reason."

It may be freely conceded that the 40-mill act did reduce the tax burden of the general property owner. That act, however, has not reduced the tax burden of this appellant, but, on the contrary, has actually increased it, because the various taxing bodies in the state have imposed upon the appellant new modes of taxation, exclusive of the exaction here under attack. But wholly irrespective of that fact, it surely is not a commendable argument for the state to make that, simply because "it needs the money," an act which is in violation of the Federal Constitution thereby becomes a valid law. On that theory many criminals would go unwhipped of justice and this appellant need not comply with the act in question, because it also needs money, its earnings on the cost of its property in the State of Washington in the year 1933 having been only 1.55 per cent (Exhibit 12; R. 106).

The opinion of the court below, therefore, is based upon insubstantial distinctions and makeweights.

Its fundamental error is that, despite many decisions of this court to the contrary, it considered only form, not substance, name, not reality. The appellant has not the option of abandoning its local business while continuing to do an interstate business.

> "For in this day and age it is clear separate statewide systems for intrastate and interstate phones are not feasible, hardly possible, and to deny the proprietor of the latter the right to also operate the former would so heavily handicap and burden him, it would virtually destroy

his business, burden and destroy interstate communication or commerce." (7 Fed. Supp. 12)

The substance and reality, then, is that to condition the appellant's right to do an intrastate business is also to condition its right to do an interstate business, and that last right is just as much conditioned if the condition be a tax measured by gross intrastate revenues as if the condition was a tax measured by the number of wagons or cars or telephone instruments.

And surely a tax amounting to $112,251 for a *five* months period (Exhibit 22, R. 131-140) is a greater burden on interstate commerce, a harsher condition to the right to do such a business, than the mere obtaining of a license, without the payment of any fee, as in the *Holyoke* case (273 U. S. 45), or the payment of a flat fee of $10.00 annually, as in *Crutcher v. Kentucky*, 141 U. S. 47, or the compulsion to file a financial statement, list of stockholders, etc., as in *International Textbook Co. v. Pigg*, 217 U. S. 91, or the requirement that telegraph messages be sent in the order received and delivered by messengers within one mile of the office. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347.

The language of Judge Steinert, one of the dissenting judges below, is apposite. He said:

> "The majority seek to make a distinction between a tax imposed as a license to do business or one upon the instrumentalities used, and a tax on gross income. They concede that a license tax to do business or a tax upon the instrumental-

ity inheres in the interstate as well as in the intrastate business, but they hold that, 'where the tax is upon the gross income, the income from the interstate business may be segregated from the intrastate and be held valid.' The distinction is *without substance* when the result in a given instance is to burden or interfere with interstate commerce. The Federal government having created a field within its exclusive regulatory jurisdiction, the state may not invade it, nor by any act, direct or indirect, interfere with it."

Apposite also is the pronouncement of Mr. Justice Harlan, speaking for this court, in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 26.

"The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a State for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the

State, and to be respected until Congress covers the subject by legislation. *Cooley v. Port Wardens*, 12 How. 299, 320; *Sherlock v. Alling*, 93 U. S. 99, 104; *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 463; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100; *N. Y. & N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 632; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 626; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297. We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent *in fact* on the value of its property *situated within the State.*' *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 696; *Leloup v. Mobile*, 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without lia-

bility to taxation there, *on account of such business.*

"But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown but its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

The Washington State Supreme Court found the facts in favor of this appellant. It found the law to be as declared by this court. But it refused to apply the law to the facts.

Appellant respectfully submits that the decree of the Supreme Court of the State of Washington is erroneous, and prays that it be reversed.

Respectfully submitted,

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